IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 139 of 1992

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SURAT MUNICIPAL CORPORATION - Appellant(s)
Versus
BABUBHAI ZAVERBHAI PATEL - Defendant(s)

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Appearance :
MR KD PANDYA for MR PRASHANT G DESAI for Appellant(s) : 1,
RULE SERVED for Respondent

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 11/01/2007

ORAL JUDGMENT

1. Shri K.D. Pandya under the authority of Shri P.G. Desai, learned counsel for the appellant.

None for the respondent though served.

2. The appellant being aggrieved by the judgment and decree dated 24.11.87 passed by 2nd Joint District Judge, Surat in Regular Civil Appeal No. 54 of 1984, confirming the judgment and decree dated 18th August, 1983 passed by learned Joint Civil Judge [Junior Division] Surat in Regular Civil Suit No. 595 of 1979 decreeing the plaintiff's suit, is before this Court, submitting, inter alia, that the two courts below did not properly appreciate the provisions of Sections 254, 260 and 478 of the Bombay Provincial Municipal Corporations Act, 1949.

3. Short facts necessary for proper disposal of the matter are that the present appellant's officer, on inspection, found that the respondent, an occupant in the premises was making a new construction of 6'x 4.8” on Otta [outer platform of house] and the said construction was without any permission from the Municipal Corporation. Accordingly, notice under Section 478 of the Act dated 13.2.79 was issued to the plaintiff that he was required to remove the said illegal

construction and in case, he did not do so, the Municipality would remove the said construction. The plaintiff immediately approached the Civil Court, challenged the correctness, validity and propriety of the said notice [the courts below have referred to the said notice as “exh.96”] and also prayed for an injunction that the authorities be restrained from demolishing the property or taking any other coercive action. It appears that interim order was made in favour of the plaintiff and notices were issued to the present appellant. The appellant-defendant appeared before the Court, filed its written statement, inter alia, submitting that notice under Section 478 was absolutely legal, construction made by the present respondent [plaintiff] was illegal, without any permission under Section 254 of the Act and as such, the present appellant-Municipality was entitled to issue notice requiring the plaintiff to remove the said illegal and unauthorized construction.

4. As the parties joined the issue, the learned trial court allowed the parties to lead and

produce oral and documentary evidence. After hearing the parties, the learned trial court held that in absence of a notice under Section 260 of the Act, a notice under Section 478[1]/[2] of the Act was illegal. It also held that the construction alleged to be illegal construction, in fact, was not new construction. The plaintiff was simply repairing and repainting the construction which was already in existence.

5. A question was also raised before the learned trial court that the shop in possession of the plaintiff is one amongst 20 shops belonging to Swaminarayan temple and as the plaintiff had become an eyesore the temple authorities in collusion with the municipal authorities got the notice issued.

6. The learned trial Judge, after holding that in absence of a notice under Section 260, a notice under Section 478 could not be issued, decreed the suit. The appellant/defendant, being aggrieved by the said judgment and decree, filed First Appeal which came to be dismissed by the

learned first appellate court on the ground that there was no change in the construction, there was no new construction, the plaintiff was simply repairing and repainting the old construction, it affirmed the judgment and decree passed by the learned trial court.

7. The appellant being aggrieved by the said judgment and decree is before this Court.

8. The appeal has been admitted for hearing the parties on 1.10.92 on the following substantial questions of law.

    1. Whether the appellate court has erred in holding that permission under Section 254 of the BPMC Act is not necessary inspite of the fact that construction was going on?
    2. Whether the appellate court has erred in holding that the said construction is not an illegal construction without there being any issue framed by the trial court or the appellate court?

6. I have heard Shri Pandya for the appellant. Despite service of notice upon the respondent, neither the respondent is present nor there is any representation on his behalf. I proceed exparte against him.

7. Shri Pandya, learned counsel for the appellant submits that Sections 260 and 478 work in different fields. According to him, in case, sanction or permission is granted under Section 254 on an application by the intending builder and intending builder is making construction contrary to permission or sanctioned plans, then, Section 260 shall come into operation, according to him, Section 478 applies to the case where construction is patently illegal, unauthorized, contrary to rules and is even without permission. He submits that in a given case, where Municipality is of the opinion that the construction is patently illegal and is without permission under Section 254, then, proceedings under Section 260 are not required to be drawn, but notice under Section 478 can straightaway be issued and if the

plaintiff/noticee is of the opinion that he is required to show cause against the said proposed demolition, then he can always file his objections.

8. For proper appreciation of the argument raised by the learned counsel for the appellant, I refer to Section 254 of the BPMC Act, 1949. It reads as under:-

> *254. Notices to be given to Commissioner of intention to make additions, etc. to building.-[1] Every person who shall intend-*
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> > *[a] to make any addition to a building,*
> > *[b] to make any alteration or repairs to a building, not being a frame-building, involving the removal or re-erection of any, external or party-wall thereof or of any wall which supports the roof thereof, to the extent exceeding one-half of such wall above the plinth level, such, half to be measured in superficial seal.*
> > *[c] to make any alteration or repairs to a frame-building, involving the removal or re-erection of more than one-half of the posts or beams in any*

such wall thereof as aforesaid, or involving the removal or re-erection of any such wall thereof as aforesaid to an extent exceeding one-half of such wall above plinth level, such half to be measured in superficial feet,

[d] to make any alternation in a building involving-

[i] the sub-division of any room in such building so as to convert the same into two or more separate rooms, or

[ii] the conversion of any passage or space in such building into a room or rooms,

[e] to repair, remove, construct, reconstruct or add to any portion of a building abutting on a street which stands within the regular line of such street,

[f] to carry out any work in a building involving-

[i] the construction or reconstruction of a roof,

[ii] the conversion of a roof into a terrace,

[iii] the conversion of a terrace into a roof, or

[iv] the construction of a lift shaft,

[g] to carry out any repairs to a building involving the construction of

a floor of a room [excluding the ground floor],

[h] to permanently close any door or window in an external wall, or

[i] to remove or reconstruct the principal staircase or to alter its position,

shall give notice to the Commissioner, in the form prescribed in the by-laws and containing all such information as may be required to be furnished under the by-laws.

[2] Every such notice shall be signed in the manner prescribed in the by-laws and shall be accompanied by such documents and plans as may be so prescribed."

9. In the matter of **J.G.Vyas & ors. v. Vijay Housing Development & Anr., [1994 [1] GLR 377]**, this Court has held that the demolition of a structure entails serious consequences on the rights of the owners and occupiers and may affect livelihood if any vocation is carried out in such place. It would, therefore, be obvious that before making any demolition order, a hearing is required to be given to the persons concerned. The Court further observed that from

the provisions of the Sections 260 and 478 of the Act, no intention of the Parliament can be culled out to exclude the rule of hearing. Section 254 in its true spirit provides that every person who intends to do a particular act shall give notice to the Commissioner in the form prescribed in by-laws containing all such informations as may be required to be furnished under the by-laws. Such permission may be granted by the authority; in case it is found that the permission is being violated and constructions are being raised contrary to the sanctioned plans, then, Section 260, in the opinion of this Court, would cover the field. Section 260 of the Act reads as under:-

> *"260. Proceedings to be taken in respect of building or work commenced contrary to rules or bye-laws.- [1] If the erection of any building or the execution of any such work is descried in section 254 is commenced or carried out contrary to the provisions of the rules or by-laws, the Commissioner, unless he deems it necessary to take proceedings in respect of such building or*

work under section 264, shall-

[a] by written notice, require the person who is erecting such building or executing such work or has erected such building or executed such work on or before such day as shall be specified in such notice, by a statement in writing subscribed by him or by an agent duly authorized by him in that behalf and addressed to the Commissioner, to show sufficient cause why such building or work shall not be removed, altered or pulled down, or

[b] shall require the said person on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorized by him in that behalf, and show sufficient cause why such building or work shall not be removed, altered or pulled down.

[2] If such person shall fail to show sufficient cause, to the satisfaction of the Commissioner, why such building or work shall not be removed, altered or pulled down, the Commissioner may remove, alter or pull down the building or work and the expenses thereof shall be paid by the said person."

10.From a fair reading and understanding of

Section 260, it would clearly appear that if the erection of any building or execution of any work described in Section 254 is commenced or carried out contrary to the provisions of the rules or by-laws, then, the Commissioner, if he does not propose to take an action under Section 264, shall issue written notice, require the person raising construction to show cause that why such construction be not removed and if such person fails to show sufficient cause, then, the Commissioner would be entitled to pull down the said construction.

11. Section 260 in fact, has nothing to do with illegal constructions which have been made without obtaining any sanction or are absolutely illegal. Section 260 is a provision which forewarns a person that after obtaining sanction or permission for construction, reconstruction, repairs etc., he would not be entitled to do anything contrary to the sanction. Section 260 has nothing to do with absolute illegal constructions.

12. Section 478 of the Act reads as under:-

"478. Work or thing done without written permission of the Commissioner to be deemed unauthorised.- [1] If any work or thing requiring the written permission of the Commissioner under any provision of this Act or any rule, regulation or by-law is done by any person without obtaining such written permission or if such written permission is subsequently suspended or revoked for any reason by the Commissioner, such work or thing shall be deemed to be unauthorised and, subject to any other provision of this Act, the Commissioner may at any time, by written notice, require that the same shall be removed, pulled down or undone, as the case may be, by the person so carrying out or doing. If the person carrying out such work or doing such thing is not the owner at the time of such notice then the owner at the time of giving such notice shall be liable for carrying out the requisitions of the Commissioner.

[2] If within the period specified in such written notice the requisitions contained therein are not carried out by the person or owner, as the case may be, the Commissioner may remove or alter such work or undo such thing and the expenses thereof shall be paid by such person or owner, as the case may

be.”

13. Section 478 relates to work or thing which was carried out or done without written permission of the Commissioner and that such work or thing would be deemed to be unauthorized.

14. If certain permission for carrying out certain work is obtained under Section 254 after notice to the Commissioner and thereafter sanction or permission is violated by raising a different construction, action under Section 260 would be permissible, but in case, where no permission is ever applied, no sanction is ever given and owner/occupier starts raising construction, then, Section 478 would apply. Section 478 clearly provides that where permission is needed and such permission is not obtained, then, such work or thing so done would be deemed to be unauthorized. Sub-section [1] of Section 478 clearly provides that Commissioner may issue notice for removal of such construction or ask person to undo what he had done without the permission. In view of the above-referred judgment, such notice may be deemed to be a

notice to show cause and such party after receiving the notice would be entitled to appear before the Commissioner and satisfy him that either permission was not needed or construction was not illegal or the work so done was not unauthorized. If the Commissioner is not satisfied with the explanation so offered, then, the Commissioner would be entitled to pass further order under Section 478[2] on failure of the party which has raised illegal construction or has done something illegal directing removal of illegal construction and undo the thing done unauthorizedly. In a case where construction is absolutely illegal, then, notice under Section 260, in the opinion of the Court, in fact, would not be required. The courts below were unjustified in holding that notice under Section 260 was required and in the absence of such notice direction under Section 478[1]/[2] of the Act could not be issued.

15. The findings recorded by the two courts below cannot be approved, the same are accordingly set aside.

16. In the matter of **Municipal Corporation of Ahmedabad v. Ben Hiraben Manilal [AIR 1983 SC 537],** the Supreme Court had considered the effect and impact of Sections 260 and 478 of the Act and has also observed that both the sections can be read in juxtaposition. The Supreme Court observed as under:-

> *"A notice under Section 260[1][a] in respect of an unauthorised construction would not be unauthorised and illegal because the construction was not made by the noticee but was in existence when she purchased the premises and the expressions used in Section 260 by themselves are not quite clear, as to whether it is directed against the person who has commenced or carried out the construction contrary to the provisions of the by-laws or the rules or whether in view of the language used in sub-cl. [a] of sub-section [1] of Section 260 namely "has erected such building" notice could also be issued to any person other than who has actually built the unauthorised building as the power to take action against the persons who had not built the infringing construction is available when S.260[1][a] is read in conjunction with Sec.478.*

The question involved being one of construction of a provision of a statute that construction must be so made as to be in conformity with the other provisions of that particular statute and the provisions must be read as a whole. This being a question of law, Section 478 can be relied upon in support of the notice under Section 260[1][a]. If indeed Section 478 comprehends both the owner or the occupier who has actually constructed and as well as the owner or occupier of the building which has been unauthorizedly constructed, then the action of the Corporation can be supported. It is well settled that the exercise of a power if there is indeed power, will be referable to a jurisdiction, when the validity of the exercise of that power is in issue, which confers validity upon it and not to a jurisdiction under which it would be nugatory though the section was not referred, and a different or a wrong section of different provisions was mentioned.

Further, if the purpose of these regulations and the object of these regulations, i.e. regulating the building construction in a municipal statute, is kept in view it will be anomalous result if it be said that if a building is constructed

illegally or in an unauthorised manner, action can only be taken against the person who is doing the unauthorised act or illegal act but after the construction of the building is passed over to others, the construction of the building enjoys immunity from any action in respect of the same. That could not be a proper construction particularly in the case in question in view of the specific language used in the latter part of sub-sec.[1] of Sec.478."

17. The appellate court rightly appreciated the issue when it observed that the real dispute between the parties was that the plaintiff was making illegal construction or was simply repairing and painting the existing construction. The learned trial Judge referred to exh.96, but unfortunately did not appreciate the true contents of the said documents. The notice dated 13.2.79 clearly provided that the plaintiff was making a new construction of 6' x 4.8" and was also fixing shutters and such construction was illegal. If that was the situation on 13.2.79 and the work was in progress, then, the court was required to look

into the report of the Commissioner appointed by the court, who clearly informed the court that the construction was to the extent of 7'x 3.9”. The trial court did refer to this fact in para-8 of its judgment, but did not attach any importance to it and unfortunately, the appellate court did not at all appreciate these facts in their true spirit. If the notice dated 13.2.79 showed that the construction in progress was to the extent of 6' x 4.8”, then, that would be the position of construction on 13.2.79 but in any case anything beyond that would be a bad construction. In the present case, unfortunately, the learned courts below did not appreciate the true dispute. In a case like present the plaintiff would always be required to satisfy the court by leading cogent oral and documentary evidence that the construction in dispute was in existence. In the present case, the plaintiff being tenant could certainly produce documents or could examine someone from the office of the landlord to prove and show that the he was a tenant and particular

premises were demised in his favour and there was some existing construction on otta, when he was inducted as a tenant.

18. In absence of any cogent evidence, the learned courts below could not hold that the construction was old and the plaintiff was simply repairing the same, specially when the notice issued by the Municipality and the Commissioner's report showed that the construction was of different size.

19. In the opinion of this Court, the courts below erred in holding that in absence of a notice under Section 260, the Municipality could not issue notice under Section 478 of the Act. The learned courts below also erred in not appreciating that the construction as referred to in the notice and as found by the Court Commissioner being different, could not be held to be old construction. I must hold that permission under Section 254 of the Act was required in the present case.

20. The judgments and decrees passed by the two courts below are bad, contrary to the records

and the same deserve to be set aside and are accordingly set aside. The appeal is allowed and the suit of the plaintiff is dismissed. However, there shall be no order as to costs.

[R.S. GARG, J.]

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